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Supreme Court, U.S.
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NO. 91-2006

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

WAYNE ESTELLE, Warden, Petitioner,

v.

GARY STEWART BOARDMAN, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

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WAS IT A PROPER EXERCISE OF DISCRETION FOR THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT TO FIND, BASED UPON THE HISTORY OF THE CASE, THAT CALIFORNIA WAIVED ANY TEAGUE v. LANE DEFENSE?

II.

DOES A DEFENDANT HAVE A FEDERAL DUE PROCESS RIGHT OF ALLOCUTION UPON REQUEST PRIOR TO SENTENCING?

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OPINION BELOW

The petition for a writ of certiorari erroneously indicates that the decision of the Ninth Circuit is published at 937 F.2d 1523. The opinion of the lower court is actually found at 957 F.2d 1523 (9th Cir. 1992).

STATEMENT OF THE CASE

Factual Statement

Respondent Boardman was sentenced to state prison for a twenty-four year term by the Superior Court of California after his guilty plea to eleven counts of offenses in violation of California Penal Code §§ 288 and 288a.

During the sentencing hearing, but prior to pronouncement of judgment and sentence, the court made the following observation:

> I also did receive a letter from Mr. Pearl (sic) [victim's father] that is part of the Probation Report.
>
> I don't know if you saw that, Mr. Ziff [defense counsel]. It was an illuminating letter that I read that shows the type of damage that he's done in matters of this nature. It creates ongoing problems for so many people. And, so, I guess I would say that without attempting to emphasize that the more (sic) than any other, that it was a letter that did have its effect upon me and it would be a letter that's expressed the problems created by what went on between the defendant and young Mr. Pearl.

[Dec. 12, 1983, RT 7-8][1]

During the sentencing hearing, Mr. Boardman, through his counsel, requested that he be permitted to allocute personally prior to the pronouncement of his sentence. The record shows Boardman's counsel advised the court, "Apparently, the defendant would like to address the court before I conclude." [Dec.13, 1983, RT 43; SER 7] This request was denied by the court, which noted that, "I'd just as soon not, if you don't mind. Any remarks should come from [defense counsel]. . . Just in general, I find it's better not to have the defendants to make comments." [Dec. 13, 1983, RT 43; SER 7]

In contrast, the parents of the victims made their presence known, and were allowed to voice their concerns to the court through the prosecutor and by written submissions forwarded to the court.[2]

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1 "RT" refers to the Reporter's Transcript of the sentencing hearing before the California Superior Court for Los Angeles County; "SER" refers to the Supplemental Excerpt of Record filed by the appellee before the United States Court of Appeals for the Ninth Circuit.

2 See generally the December 12, 1983, reporter's transcript which includes a recitation of the views conveyed to the court by the prosecution on behalf of the parents of the complaining witnesses.

Just prior to imposing sentence, the court stated:

> And I must balance the needs of protection of society against the needs and aid to you, Mr. Boardman.
>
> And I've listened to society. It's my duty to listen to society, to try to be aware of what society is telling the courts what they do at the ballots in the box, what they do with their letters to the editor, what they do when they come here in court and have some feel and be responsive to the attitude of society. (sic)

[Dec. 13, 1983, RT 68] (emphasis added)

At the conclusion of the hearing, and having refused to hear from Mr. Boardman, the court imposed a twenty-four (24) year period of incarceration. [SER 1, 4]

Procedural History

Through direct appeal, and then state and federal habeas petitions, Mr. Boardman continually pressed his claim that the sentencing court's denial of his request to be heard at the sentencing hearing constituted a denial of federal due process.

Boardman filed his petition for habeas corpus with the United States District Court on August 3, 1989. In reply

to the District Court's Order to Show Cause, California filed a response to the petition which asserted various legal bases why the petition should be denied. California did not assert a Teague defense in the District Court, even though all of the ensuing proceedings occurred after Teague v. Lane was decided by this Court.

Following denial of his petition by the District Court, Boardman appealed to the United States Court of Appeals for the Ninth Circuit. Once again, despite full briefing and oral argument, California did not assert a Teague defense.

After the Ninth Circuit published its decision on January 9, 1992, California asserted for the first time that Teague procedurally barred the relief that Boardman's petition sought for almost two and a half years. California raised this new claim in its petition for a rehearing filed January 22, 1992. Boardman was unable to respond to the petition for a rehearing since pursuant to Federal Rule of Appellate Procedure 40(a), the Ninth Circuit will not receive an answer to a petition for

rehearing unless requested by the court.[3]

On March 11, 1992, the Ninth Circuit issued a supplemental opinion in response to California's petition for rehearing. In that opinion, the Court of Appeals noted that it had the discretion to deem the defense waived where the state had failed timely to assert it. After conducting a thorough and complete balancing of the interests involved, the Ninth Circuit concluded that the state's conduct of the litigation and its failure to assert a Teague defense justified the Court's finding a waiver since "California inexplicably failed to raise the Teague defense both in the district court and on appeal." 957 F.2d at 1537 (emphasis in original) Accordingly, the Ninth Circuit exercised its discretion and found California to have waived any Teague defense.

Given the foregoing, Boardman never briefed this issue before the Ninth Circuit. This is the first time Boardman has had an opportunity to address this issue. By its actions, California seeks to convert this Court into a court of first instance for litigation of Teague claims.

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[3] Rule 40(a) of the Federal Rules of Appellate Procedure provides, in pertinent part, that "[n]o answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request." No such request was issued by the Ninth Circuit.

REASONS FOR DENYING THE WRIT

1. **The Ninth Circuit properly found, based upon the history of the case that, for whatever reason (tactical or otherwise), the Petitioner waived the right to raise a Teague defense.**

California suggests that review be granted to consider the refusal of the Ninth Circuit to address the merits of its assertion of a procedural defense based upon Teague v. Lane, 489 U.S.288 (1989). Yet, California did not advance this argument in the District Court, in briefing before the Ninth Circuit or even in oral argument. Indeed, this "defense" was raised for the first time (and then only as an ancillary issue) in California's Petition for Rehearing filed with the Ninth Circuit after the Court of Appeals had fully considered the case and published its decision.

The Ninth Circuit's refusal to consider California's Teague argument was a decision squarely within the proper bounds of its discretion, in accordance with the principles articulated in Granberry v. Greer, 481 U.S. 129 (1987), and first noted long before by this Court. Frisbie v. Collins, 342 U.S. 519 (1952) (cited in Granberry). Granberry properly calls for a court to take a "middle ground" as it exercises its discretion in construing a waiver by a state

from a failure to raise arguments and issues in a timely fashion.

Adopting this framework of analysis, in Granberry this Court rejected a stricter approach which would have either (a) absolutely precluded a party from raising the issue after the District Court proceedings, or (b) required that a court always consider the argument whenever raised, no matter at what stage or how late in the proceedings. The "middle ground" analysis requires a court to evaluate competing interests of comity, federalism and justice and thereby determine if the circumstances justify finding a waiver.

It was the Granberry "middle ground" analysis that was implemented by the Ninth Circuit here. This is evidenced by its explicit consideration of these same factors before declining to accept California's late argument. 957 F.2d at 1535-37. Clearly one consideration in the Ninth Circuit's analysis was the fact this argument had never been broached, much less developed either factually or legally, in over two years of litigation in the federal courts.

In part, in Teague this Court sought to avoid the generation of advisory opinions by precluding the

articulation of rules in cases where they would not be applied. 489 U.S. at 316. California's untimely efforts to assert Teague here pervert this underpinning of the doctrine by using it - inappropriately - to transform years of work by the federal courts into nothing more than an advisory opinion.

Apparently with the hope of obtaining a favorable result, California initially litigated this case on the merits. It did so subsequent to Teague and its progeny, of which California was surely aware. Only when it failed to obtain a favorable result did it turn to Teague in an effort to eviscerate an adverse ruling from the Ninth Circuit. California's invocation of Teague in its petition for reconsideration is no more than a transparent effort to "pull the trap door" from under the feet of the Court of Appeals and thereby nullify its decision.[4]

Quite properly, the Court of Appeals disabled the trap door by exercising its discretion to prevent this abuse of

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[4] If California's practice is endorsed, this Court will find itself, as it is here, the Court of first instance for the consideration of all issues as to whether "new rules" have been announced, whether retroactivity should be allowed or prohibited, etc. None of those concerns were ever addressed in this litigation, due to California's decision or failure to raise this issue until after the Ninth Circuit had issued its opinion.

the doctrine. Any other result would invite wasteful expenditure of the limited resources of the federal courts, which would find themselves addressing the arguments of habeas petitioners on their merits, only to face, after rendering a decision, the invocation of the Teague doctrine as a final effort to avoid an adverse result. For this reason the Ninth Circuit's decision is a proper exercise of its discretion and this matter does not merit a grant of certiorari by this Court.

As the Court of Appeals pointed out, "concerns of federalism and respect for a state's criminal judgments are marginal here because the state brought the problem on itself," 957 F.2d at 1537. The rule urged by California, requiring that waivers of Teague be express and not implied, would violate the very respect for state process which this Court has sought to engender. Under such a rule, if a state litigant fails to raise the issue, a prudent federal court would be obliged to inquire into counsel's strategic decisions in order to avoid the specter of a ex post facto nullification of its decision in the event that the state were later to choose to spring this "trap door."

In Teague, this Court gave the states a means to avoid endless collateral litigation of criminal matters. In

Collins v. Youngblood, 497 U.S. 37 (1990), this Court made it clear that Teague was a tool which could be used by a state when appropriate, but which was not "jurisdictional" in that it is not so fundamental that a court must raise the issue sua sponte. Consequently, whether or not to invoke Teague is a strategic decision properly vested in the state. Yet here California urges this Court go further and establish a rule that would require federal courts to second guess the strategy of the states when they chose not to utilize this tool. Surely, the federal courts should be entitled to rely upon the state to raise, in a timely fashion, those issues and arguments which serve its interests.

Appropriately utilized, Teague allows the federal courts to avoid extended consideration of the merits of habeas corpus petitions which seek relief under "new" rules. California seeks to accomplish exactly the opposite result - luring the federal courts into addressing the claim on its merits by withholding of the procedural defense,[5] and thereby encouraging the court to expend the

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[5] No evidence was ever presented to show whether the failure to argue Teague ab initio was caused by a strategic decision or some other reason. Nonetheless, competent counsel for the State of California, well versed in the law of habeas corpus, surely cannot suggest an unfamiliarity with so fundamental a decision in this area.

time and effort to consider fully the case, only to have the state seek to emasculate the decision by a last minute invocation of Teague. Moreover, Teague was never intended to provide a vehicle for states to disable the power of the federal court once exercised. The federal courts cannot afford to allow themselves to be manipulated in this fashion by disappointed litigants.

2. The Ninth Circuit's exercise of discretion does not put it at odds with any other Circuit's decision.

California advances an illusory conflict between the circuits as a basis for urging review by this Court. An examination of the authority cited in the petition shows that no such conflict exists. California suggests that three circuits refuse to infer a waiver of the Teague argument based upon a state's failure to raise it. The cases cited reveal no such rule of refusal to infer waiver.

First, in Smith v. Black, 904 F.2d 950 (5th Cir.1990), vacated, 112 S.Ct. 1463 (1992),[6] the court pointed out that courts had differed as to "the appropriateness of considering Teague limitations without the issue having been raised by the parties." 904 F.2d at 981 n. 12. The

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6 Smith was vacated by a per curiam order of this Court, making its citation suspect.

Fifth Circuit then proceeded to consider a Teague defense, but did so as an exercise of its discretion. Id. This, of course, harmonizes with the Ninth Circuit's actions here in that it recognizes that the courts have discretion as to the application of Teague.

California also cites Hanrahan v. Thieret, 933 F.2d 1328 (7th Cir. 1991), cert. denied, 112 S.Ct. 446 (1991). In this matter the Seventh Circuit endorsed its earlier decision "concluding that State had waived any argument based on Teague by failing to raise retroactivity objections when District Court asked for briefing. . ." 933 F.2d at 1337 n. 19.

Next, in Card v. Dugger, 911 F.2d 1494, 1523 n. 30 (11th Cir. 1990), the Eleventh Circuit did not consider the Teague issue because the state did not raise it. Likewise in Kordenbrock v. Scroggy, 919 F.2d 1091 (6th Cir. 1990) (en banc), cert. denied, 111 S.Ct. 1608 (1991), the Sixth Circuit simply found a waiver of Teague based upon the state's failure to raise the argument. 919 F.2d at 1104 n. 4. These cases all stand for the proposition, as implemented here, that a court has the discretion to find a waiver of Teague when a litigant chooses or fails timely to raise the issue.

Totally inapposite, and arguably mischaracterized in the petition, is Hopkinson v. Shillinger, 888 F.2d 1286 (10th Cir. 1989) (en banc). There the Tenth Circuit found that the failure to raise Teague did not result in a waiver of the issue because Teague was decided while that case was pending, and the court did not feel the state could have been expected to have anticipated the decision. 888 F.2d at 1288. Here, of course, Teague was decided years prior to California's belated invocation of the rule, and thus no similar element of surprise from the new doctrine can be discerned.[7]

In sum, California urges this Court to grant review simply because it has not prevailed below. As discussed, the Ninth Circuit's ruling embodies a proper exercise of its discretion. After full consideration of the interests of comity, federalism and fairness, that court elected not

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[7] In addition, Collins v. Youngblood, supra, was decided in June, 1990. Consequently California has long been on notice that the federal courts are not mandated to consider Teague issues in the absence of an argument by the parties. Of equal importance is the fact that California raises this asserted defense - late - with respect to the crux of all of the litigation that culminated in the Ninth Circuit's decision. Mr. Boardman has all along contended that a denial of due process was at stake by virtue of the refusal of the sentencing court to afford him the right of allocution. This is not a case where the decision turned on facts or a legal theory unforeseen by the litigants. This was the issue in the case.

to allow on a petition for rehearing the invocation of a doctrine designed not to create advisory opinions but rather to avoid them. California cites no case that supports its novel argument that the federal courts cannot rely upon the strategic decisions of advocates but rather must undertake an obligation to obtain express waivers of all available arguments.[8] Review is uncalled for here as the Ninth Circuit acted well within the discretion which this Court, and all others, have agreed is appropriate.

3. **The Ninth Circuit's decision in this matter will not prevent California from raising in a timely fashion any applicable Teague defenses in future cases.**

The Ninth Circuit's determination that California waived its right to assert a Teague defense in this matter is a fact specific determination that will not in any way impede California's assertion of such defenses in future cases. The Ninth Circuit's supplemental opinion makes clear that California "brought this problem on itself"

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[8] California also urges this Court to view the argument as preserved so long as it opposed the grounds raised in the petition generally. In so arguing, California fails to state why courts should have to construe so broadly its position, or any possible justification why the courts should not require the state simply to articulate this defense. Indeed, such an approach would deprive the courts of an early focus on a dispositive defense, one which if valid could well save the courts and the litigants the unnecessary expenditure of funds occasioned by further litigation.

by the manner in which it handled the litigation. 957 F.2d at 1537.

If this Court presumes, as surely it is entitled to do, that California will litigate future cases with the orders and decision of this Honorable Court in mind, then the federal courts will be less likely to see California again engage in tactics such as those used here. Such an outcome will promote respect for and ready utilization of this Court's decisions by California, as well as result in judicial economy for the federal courts in which California litigates.

Further, such a course will ensure this Court is not called upon repeatedly to act as a court of first instance for the litigation of issues such as the factual question of why the defense was not raised earlier below. It will further have the salutary effect of encouraging litigants to litigate fully all issues in a uniform and timely fashion. This will also ensure that the lower courts perform their proper function of providing a forum for resolution of factual matters and narrowing of the issues without need for involving this Court in such matters.

* * * * *

4. The Ninth Circuit, looking to tradition and practice, properly found that a defendant's right to allocute on request prior to judgment and imposition of sentence is a fundamental right guaranteed by due process.

This Honorable Court decades ago aptly observed: "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." Green v. United States, 365 U.S. 301, 304 (1961). The Ninth Circuit's decision is true to this proposition, and breathes life into its principle. In doing so, contrary to California's assertion, it does not create conflict with other circuits' decisions.

The precedential value of the decision here is expressly limited to "circumstances in which a defendant, either unrepresented or represented by counsel, makes a request that he be permitted to speak to the trial court before sentencing." 957 F.2d at 1530. In this regard, the Ninth Circuit's decision is fully consistent with the principle articulated in Green as well as with the decisions of all other Circuit Courts of Appeal. This is a fundamental reason that certiorari should not be granted: there is no conflict within the circuits on the right to allocute when a defendant so requests.

The decision, with its narrow holding, does not create a conflict with any cases of any circuit. Rather, as the decision correctly observes, the allegedly conflicting

decisions from other circuits are readily distinguishable on their facts. This merits discussion.

The logical starting point for such a review is the only reported case with similar facts: Ashe v. North Carolina, 586 F.2d 334 (4th Cir. 1978). Like Mr. Boardman, the Ashes were affirmatively denied an opportunity to address the sentencing court before their sentences were imposed. They, too, petitioned for a writ of habeas corpus, seeking relief from what they construed was an unlawfully imposed sentence. In granting the writ and remanding for resentencing, the Fourth Circuit found that affirmatively silencing a defendant who wishes to be heard prior to sentencing is a violation of due process. 586 F.2d at 336 ("Petitioners contend that refusal of a defendant's request to speak to the sentencing court constitutes denial of due process under the fourteenth amendment and we agree.")[9]

Accordingly, both Ashe and Boardman, the only two decided cases where a defendant was affirmatively denied allocution, have resulted in the same constitutional

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9 It bears observation that the court recognized that limits can be placed upon a defendant's right of allocution. "This is not to say that a defendant's right to address the sentencing court is unlimited. The exercise of his right may be limited both as to duration and as to content." Ashe v. North Carolina, 586 F.2d at 336-37.

conclusion: such a denial is a violation of due process. There is no conflict between the circuits on this point.

The cases that did not find allocution to be a constitutionally based right are readily distinguishable. In none was a defendant affirmatively refused the right to allocute by the sentencing court. "All of the cases denying Constitutional status to allocution are factually distinguishable because they do not involve the denial of an affirmative request to speak." Boardman, 957 F.2d at 1529 (emphasis in original).

The most common scenario presented in the divers reported cases occurs when the sentencing court fails to inquire as to whether the defendant wishes to be heard.[10] Thus, these decisions address a different question: Does a defendant have a constitutional right to be invited to allocute prior to imposition of sentence? The clear, unanimous answer to this question has been in the negative.

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10 In the federal context this has repeatedly been held to be a violation of Rule 32 of the Federal Rules of Criminal Procedure which requires resentencing. United States v. Miller, 849 F.2d 896, 897 (4th Cir. 1988); United States v. Prince, 868 F.2d 1379, 1386 (5th Cir. 1989); United States v. Turner, 741 F.2d 696, 698-99 (5th Cir. 1984); United States v. Walker, 896 F.2d 295, 301 (8th Cir. 1990). These decisions were not premised upon any constitutional right, but rather upon the provisions of Rule 32.

California uses this different answer (to this different question) as the basis for the perceived "conflict" it finds between the decision below in this matter and the other reported cases. As shown in the Ninth Circuit's decision, impartial analysis reveals no legal conflict exists.[11]

Boardman and Ashe are the only two instances in which sentencing courts affirmatively denied defendants the right to be heard. The paucity of such cases is not surprising when considered against the statutory framework and caselaw that exists in most jurisdictions directing courts to permit defendants to allocute prior to sentencing. Indeed, even the instant litigation would not have occurred if the trial judge had complied with California's own

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[11] Although Judge Trott begins his discussion by observing that his sister circuits have reached conflicting decisions on the question of allocution, he thereafter demonstrates that in fact no conflict exists. While the following cases discuss the issue, they do so in dicta since each was controlled by the terms of Rule 32. United States v. Moree, 928 F.2d 654, 656 (5th Cir. 1991), and United States v. Jackson, 923 F.2d 1494, 1496 (11th Cir. 1991). Cf. United States v. Coffey, 871 F.2d 39, 40 (6th Cir. 1989), and United States v. Fleming, 849 F.2d 568, 569 (11th Cir. 1988). However, none of these courts was actually called upon to decide the constitutional dimensions of a court affirmatively silencing a defendant who wished to allocute. For this reason, the doctrine of judicial restraint in constitutional matters dictates that their opinions on the subject amount to nothing more than dicta.

procedures.[12]

This illustrates an equally compelling reason why this matter does not merit the grant of a writ of certiorari. Such a fact pattern simply is not likely to occur often. Most jurisdictions already have statutes similar to the

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[12] While California case law does not require a defendant personally be afforded allocution, California Penal Code § 1200 clearly notes, in pertinent part, that "When the defendant appears for judgment he must be . . . asked whether he has any legal cause to show why judgment should not be pronounced against him." This fits squarely within the definition of allocution given by Black's Dictionary: "Formality of court's inquiry of prisoner as to whether he has any legal cause to show why judgment should not be pronounced against him on verdict of conviction." Black's Law Dictionary 70 (5th ed. 1979).

federal rule.[13] Hence, the fact pattern presented here is

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A partial survey of the states and the District of Columbia reveals the following. These jurisdictions are among those that follow the federal model embodied in Rule 32 of the Federal Rules of Criminal Procedure: **Alaska**, 1991 Alaska Rules of Court, Rule 32(a); **District of Columbia**, D.C.Code Ann. §23-103 (1981); **Idaho**, Idaho Code, Criminal Rules, Rule 33 (1991); **Kansas**, Kan.Stat.Ann. §22-3424 (1991); **Maine**, Rule 32(a)(2) of Rules of Court (1991)(with exception for certain lesser categories of offenses); **Maryland**, Md.Code Ann. §4-343((d) (applicable in capital cases); **Massachusetts**, Mass.Ann.Laws Rule 28(b) (Law.Co-op 1979); **Minnesota**, Minn. Rules of Court, Rule 27.03 Subd.3 (1992); **Nevada**, Nev.Rev.Stat.Ann. §176.015(2)(b) (Michie 1991); **New Jersey**, N.J.Rules Governing the Courts, R.3:21-4(b)(1991); **South Dakota**, S.D. Codified Laws §23A-27-1 (1988); **Vermont**, Vt.Stat.Ann. Rules of Crim.Pro.Rule 32(a)(1)(1983); **West Virginia**, W.Va.Code, State Rules, R.32(C) (1992); **Wyoming**, Wyo. Court Rules, R.33(a)(1)(1979).

These are among the states which have clearly recognized the right of allocution, either by statute or by caselaw: **Arizona**, 17 A.R.S. Rules of Crim.Pro. 26.10(b)(1); **Arkansas**, Ark.Stat.Ann. §§43-2301, 43-2303, 43-2813 (Supp.1973), and Tate v. Smith, 524 S.W.2d 624, 627 (1975); **Colorado**, Noland v. People, 485 P.2d 112, Coleman v. People, 482 P.2d 378; **Indiana**, Ind.Code Ann. §35-4.1-4-5 (Burns 1979 Repl.) and Minton v. State, 400 N.E.2d 1177 (1980) (applies only after conviction at trial); **Iowa**, Rule 22(3)(d) and State v. Jorden, 461 N.W.2d 356, 359 (1990); **Missouri**, Mo.Rev.Stat. §546.570 (1959) (as modified by §546.580) (applicable after conviction at trial by jury), and State v. Ashworth, 143 S.W.2d 279; State v. Kitchin, 300 S.W.2d 420, 425, cert. denied, Kitchin v. State of Missouri, 354 U.S. 914; **Montana**, Mont.Code Ann. §46-18-115(3)(1991); **Nebraska**, Neb.Rev.Stat. §29-2201 (1989); **New York**, N.Y.Crim.Pro.Law §380.50 (McKinney 1983); **North Carolina**, N.C.Gen.Stat. §15A-1334(b)(1991); **Ohio**, Ohio Rev.Code Ann. §2947.05 (Anderson 1987), and State v. Baker, 117 N.E.2d 348, 352 (1960); **Pennsylvania**, 42 Pa.Con.Stat.Ann. §1405 (Purdon 1989); **Rhode Island**, Leonardo v. State, 444 A.2d 876, 878 (1982), Robalewski v. Superior Court, 197 A.2d 751, 753 (1964), State v. Nicoletti, 471 A.2d 613 (1984); **Tennessee**, Tenn.Code Ann. §40-35-210(6) (1990); **Texas**, Tex.Code Crim.Proc.Ann. art. 42-07 (Vernon 1979); **Utah**, State v. Lorrah, 761 P.2d 1388 (1988); **Virginia**, Va.Code Ann. §19.2-298 (1950), and Bassett v. Commonwealth, 284 S.E.2d 844 (Supreme Court of Virgina, 1981); **Wisconsin**, Wis.Stat.Ann. §972.14 (West 1985).

Certain states have found it sufficient for the defendant's counsel to address the court: **Alabama**, Irwin v.

not likely to reoccur. Rather, since those courts in jurisdictions with such statutory requirements will generally follow their own law, the probability is that the problem presented here will at most occur only sporadically. For this reason, this issue does not merit the grant of a writ of certiorari.

California disingenuously argues that "in light of numerous modern procedural protections" defendants are adequately protected in other ways. (Petition for Writ of Certiorari at 16.) California offers no authority for this proposition. Rather, it simply observes that a lawyer can protect a defendant's "legitimate interests." It appears California means, but will not come right out and say, that a defendant's interest in speaking at his sentencing hearing is an illegitimate interest that should be discouraged. In fact, personal allocution serves many positive functions. It ensures that the sentencing court is fully informed prior to passing judgment, it is a step toward rehabilitation by affording a public opportunity for the defendant to express remorse, and it helps the healing process for the victims in those instances where apologies are tendered by the offender for his conduct.

State, 203 So.2d 283, 285 (1967); **Hawaii**, Haw.Rev.Stat. §§706-601(2), 706-602, 706-604(1), and State v. Medeiros, 791 P.2d 730 (1990); **Michigan**, People v. Gulley, 17 Mich.App. 646; **North Carolina**, State v. Martin, 280 S.E.2d 775, 780 (1981).

In arguing the contrary, California completely ignores a fact recognized by all who witness criminal sentencings: the silence that falls across a courtroom when a defendant speaks. The court may ultimately react in any number of ways to whatever the defendant says, but the operative point is that the defendant who seeks to be heard will have been afforded the opportunity. When the Ninth Circuit recognized the legitimacy of this right it did not stray afield from any of this Court's decisions, but rather it marched straight forward within the guideposts of due process.

The true procedural revolution underway in criminal sentencing is in the arena of victims' rights legislation. California itself is among the states that have enacted such legislation.[14] A principal goal of victims' rights legislation is to guarantee victims the right to be heard

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[14] California Penal Code § 679 ("Rights of Victims and Witnesses of Crime") and § 1191.1 contain the operative provisions. In particular, § 1191.1 states, in pertinent part, "The victim, or his or her parent or guardian if the victim is a minor, or next of kin has the right to appear, personally or by counsel, at the sentencing proceeding and to reasonably express his or her views concerning the crime, the person responsible, and the need for restitution. The court in imposing sentence shall consider the statements of victims, parents, or guardians, and next of kin made pursuant to this section. . . (emphasis added).

at a defendant's sentencing.[15] While the sentencing court would not hear from Mr. Boardman, it succinctly stated that it had heard the community's concerns and had them in mind in determining his sentence. Considered against a national backdrop where thirty-two (32) states have such victims' rights legislation, the defendant's interests in allocution are all the more pronounced. California asks this Court to permit a sentencing structure where the sole interested party not guaranteed the right to be heard is the defendant whose fate and liberty hang in the balance.

5. There is no reason for concern here for hybrid representation or for the federal constitutional decisions of the California Supreme Court.

California proffers two final reasons it believes this Court should grant certiorari: (1) concern for the possibility of creating "hybrid representation" and (2) the authority of the California Supreme Court. Each of these should be dispatched by this Court summarily.

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15 A recent Wall Street Journal article notes that the National Conference of Commissioners on Uniform State Laws, a Chicago group that drafts legislation for nation-wide use, has just approved a victims rights act. One of the provisions of the act is allocution for victims both before sentencing courts and parole boards. The article notes that "[t]hirty-two states allow such oral statements, which victims-rights groups say are therapeutic and empowering, particularly for domestic-violence and child-abuse victims." Wall Street Journal, August 7, 1992, at B1, col. 5.

Hybrid representation will not result from guaranteeing a defendant the right personally to address a sentencing court prior to the imposition of sentence. Were it otherwise, surely such a result would have been observed in the federal trial courts of this country years ago following the implementation of Rule 32 of the Federal Rules of Criminal Procedure. The right of allocution is analogous to a defendant's right to testify, regardless of whether he is represented by counsel. Permitting a defendant to address a court, usually for a matter of moments or minutes, does not detract from sentencing proceedings; rather it enhances the integrity of the proceedings by ensuring that the sentencing court is fully advised by all concerned before it issues its order.[16]

Finally, while the California Supreme Court undoubtedly does enjoy respect for its jurisprudence, its decisions on federal due process simply are not binding on

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16 In support of its view that the Ninth Circuit has contravened this Court's prior decisions, California notes this Court's prohibition on "hybrid representation" contained in McKaskle v. Wiggins, 465 U.S. 168 (1984). Yet the facts of McKaskle take us to heretofore unseen limits. The standby counsel appointed in that matter to assist the defendant were continuously accepted and then rejected anew by the defendant over the course of a three day trial. A quick review of the facts set forth in Justice O'Connor's opinion demonstrates the uniqueness of the situation. 465 U.S. at 170-72.

this Honorable Court or on the lower federal courts. Accordingly, its decision regarding allocution does not and should not determine the issue for this Honorable Court.

CONCLUSION

For the foregoing reasons, this matter does not present issues that merit decision by this Honorable Court. It is respectfully urged that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

DATED: August 10, 1992

PHILLIP A. TREVIÑO